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IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

RICHARD RIVENBURGH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 2, 2008

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] In accordance with Rule 37.2(a), AAR has provided notice to Respondent's counsel of AAR's intent to file a brief. Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and

[1] The letter expressing consent has been filed with the Clerk of the Court.

Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

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[2] *E.g., Norfolk Southern Ry. Co. v. Sorrell*, 547 U.S. 1127 (2006); *Illinois Cent. R.R. v. Smallwood*, 544 U.S. 992 (2005); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

In this case, the court below erroneously held that a "relaxed" standard of causation and negligence applies in FELA cases. This ruling echoes prior decisions of the Second Circuit and some other lower courts, but is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts. Confusion over the proper standard of causation and negligence, issues that can affect the outcome of virtually every FELA lawsuit, has existed for decades in the lower courts. Therefore, AAR members, who make up the vast majority of FELA defendants, have a strong interest in seeking definitive guidance on these issues from this Court.

When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal

law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interest of *Amicus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File A Brief which is filed along with this brief.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari in order to provide guidance on two fundamental issues arising under the Federal Employers' Liability Act (FELA), 45

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

U.S.C. §§51-60, that have been the source of confusion and lack of uniformity for many years: the proper standards of causation and negligence. The way courts interpret these concepts has a significant impact on the outcome of numerous FELA cases. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, lower courts have held that more "relaxed" burdens apply to plaintiffs in proving causation and negligence in FELA cases than would in an ordinary common law action. Only review by this Court, and establishment of the proper standards of causation and negligence, will end this intolerable lack of uniformity on these fundamental issues.

A reading of the language of the statute, the legislative history and early decisions of this Court shows that Congress did not intend to modify the common law standards of negligence and causation when it enacted FELA in 1908. Congress did expressly modify some of the prevailing common law defenses that made recovery more difficult, but this statutory modification of common law did not include any alteration of the standards of negligence and causation. This Court has held repeatedly that modifications to the common law are limited to those areas that Congress expressly addressed, and has reiterated on multiple occasions that proximate cause and ordinary negligence are the concepts that apply under FELA. There is simply no support for the lower court decision that hold otherwise.

The decision below, and similar decisions, have transformed FELA in a hybrid compensation law. The causation and negligence standards have been relaxed to the point of making FELA close to a no-fault statute. At the same time, FELA incorporates

the concept of full tort damages. In contrast, the workers' compensation systems that cover virtually all but the railroad industry offer benefits without regard to fault, but limit and cap benefits in order to promote return to employment. The unwarranted modification to FELA that have been engrafted onto the statute by some lower courts is both contrary to Congress's intent and bad public policy.

ARGUMENT

I. THE PROPER STANDARD OF CAUSATION AND NEGLIGENCE ARE FUNDAMENTAL ISSUES ARISING UNDER FELA WHICH CONTINUE TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

"It is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject. *Parker v. Atchison, Topeka & Santa Fe Ry. Co.,* 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). As FELA marks its one hundredth anniversary, this observation of the California Court of Appeals remains an accurate, and lamentable, description of the state of FELA jurisprudence. The time is long due for this Court to address the issue of the proper standard of causation under FELA, a question which it broached, but ultimately did not address, last year in *Norfolk Southern Ry. Co. v. Sorrell*, 127 S. Ct. 799 (2007). As with the standard of causation, the standard of negligence under FELA also is the subject of confusion, and absence of uniformity, in the lower courts. This issue too demands guidance from this Court.

A. Certiorari Should Be Granted Because the Erroneous Interpretation of FELA by the Court Below Has a Real, and Significant, Impact on the Outcome of FELA Cases

As Petitioner explains, a transformation has occurred in FELA jurisprudence over the past fifty years to the point where there is a serious split of authority in the lower courts on the standards of causation and negligence that apply in FELA cases [Petition at 9-15]. Typically, courts erroneously ascribe to this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied,* 353 U.S. 943 (1957), an intent to "relax" the standard of causation under FELA,[2] often utilizing colorful metaphors to describe this alleged statutory metamorphosis. For example, the Seventh Circuit explained that to sustain a jury verdict in a FELA case requires "[e]vidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990); *See e.g., Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004) (Calling the plaintiff's burden of proof "featherweight.")

No statutory changes were made to FELA prior (or, for that matter, subsequent) to *Rogers* that would warrant such a radical departure from the text of FELA, and, in any event, nothing in the *Rogers* opinion supports the interpretation of FELA given by many lower courts, including the Second Circuit in this case. [Petition at 19-21] Nonetheless, the Second

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[2] *E.g., Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2nd Cir. 1999); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993); *Beeber v. Norfolk Southen Corp.*, 754 F. Supp. 1364, 1372-73 (N.D. Ind. 1990).

Circuit has interpreted *Rogers* as granting a license for even further judicial amendment of FELA, explaining that while "[t]he Supreme Court has not expressly held that a relaxed standard of negligence, as distinguished from causation, applies under FELA [citation omitted] [ ] numerous appellate courts, including ours, have construed the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation." *Uflik v. Metro-North Comm. R.R.*, 77 F.3d 54, 58, n.1 (2nd Cir. 1996). As Petitioner points out, other courts have taken similar liberty, and there continues to be a split among lower courts, not just over the proper standard of causation under FELA, but also over the proper standard of negligence. [Petition at 14-15]

The issues of the proper standards of causation and negligence under FELA are not merely a topic for musings in jurisprudential treatises: they have real world consequences. When a court employs erroneous standards governing the essential elements of a civil action, either in formulating jury instruction or ruling on dispositive motions, it can affect the outcome of the case.

A vivid illustration of this phenomenon is *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985). In this case, the railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Noting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id* at

1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

The case also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court explained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the identical conduct that gave rise to liability in the FELA action, did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA.

Other examples abound. In ruling on a railroad's summary judgment motion, the Court described the plaintiff's case as "weak" and stated that the evidence "cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

case." *Kreig v. CSX Transp., Inc.*, No. 3:05CV-456-H (W.D. Ky.)(App., *infra*, 1a-5a). Nevertheless, the Court denied the motion. The court based its ruling on its view that the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case," with its comments strongly suggesting that the outcome would have been different had this not been a FELA action.

In *Davis v. CSX Transp., Inc.*, 2005 WL 1935676 (W.D. Ky. 2005), the Court explained that the "burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." *Id.* at *1. As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a box car sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. Civ. S-01-914 GGH (E.D. Calif. 2002)(App., *infra*, 6a-15a), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and that "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Examining the evidence in the context of these legal conclusions, the court denied the railroad's motion, finding that "the plaintiff has produced sufficient evidence, drawing all inferences in plain-

tiff's favor, and given the weakened causation standard in FELA."

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, where the appellate court interprets FELA's standard of causation and negligence as "relaxed" such rulings typically do not survive appellate review. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 84 (Ky. App. 2006) the trial court granted summary judgment to the railroad, finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." However, the Kentucky Court of Appeals reversed, no doubt influenced by its view that "Congress intended FELA to be a departure from common law principles of liability" and that "FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

This Court's decision in *Sorrell* may have extinguished the notion that a different standard of causation applies to employer negligence than to employee contributory negligence; however, there is no reason to believe that it will impact the thinking of lower courts on the more fundamental issues of the substantive standards of causation and negligence in FELA cases.[4] A few months ago, a federal court in Louisiana summarized the judicial attitude about

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[4] Recently, a federal court in Ohio held that while the proximate cause standard applies when evaluating an employee's motion for summary judgment, a more relaxed standard applies when evaluating an employer's motion. *Jarrett v. CSX Transp., Inc.*, 2008 WL 4239148 (N.D. Ohio 2008). No explanation is given on which section of the statute calls for such a distinction.

FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 2008 WL 3850547 at *3 (E.D. La. 2008). Similarly, a post-*Sorrell* decision of the Fifth Circuit made it clear that the relaxed burden FELA purportedly places on plaintiffs calls for courts to handle FELA cases differently than other common law negligent actions, explaining that "the FELA 'complete absence of probative facts' standard is in sharp contrast to the more demanding test applicable in *other* civil cases." *Howard v. Canadian Nat'l/Illinois Central R.R.*, 233 Fed. Appx. 356, 357 (5th Cir. 2007) (emphasis in the original).[5]

This judicial attitude will continue to impact numerous cases in the future. Several thousand FELA lawsuits are filed each year.[6] Except in the occasional case where the railroad admits liability, negligence and causation are elements of the plaintiff's case in each such lawsuit. The "relaxed" standards of causation and negligence utilized by some courts will continue to make recovery of damages more likely—often virtually assured—in FELA cases, as many courts will continue to see FELA's overarching purpose as

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[5] In a Jones Act case decided last week, the Fifth Circuit noted that "[t]he standard of causation . . . is not demanding." *Johnson v. Cenac Towing, Inc.*, 2008 WL 4330553 (5th Cir. 2008). The Jones Act, which covers maritime employees, incorporates the substantive law of FELA. 46 U.S.C. §30104.

[6] While the number of FELA suits filed each year varies quite a bit, for the past ten years, statistics complied by AAR show that the number of suits filed annually range from about 2,500 to 8,000, with an average of just below 5,000.

promoting recovery. *See Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638 (6th Cir. 1974)("FELA's liberal purpose must be kept in mind when confronting arguments that would restrict an employer's liability under the Act." *Id.* at 641.) However, while many courts may believe that guaranteed recovery for rail employees injured on the job is good public policy, it was not Congress's intent to guarantee recovery in all cases.

B. There Is No Evidence That FELA Was Meant to Incorporate Anything but Common Law Concepts of Negligence and Causation

When FELA was enacted there was little reason to foresee that the concepts of negligence and causation, fundamental elements of the statutory remedy FELA provides, would elude clear definitions so far into the future. Congress enacted FELA in 1908 in response to what was perceived as an intolerably high injury rate in the railroad industry.[7] At this time, the concept of no-fault workers' compensation—today the predominant method of compensating workplace injuries—had not yet gained a foothold in the United States. Therefore, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in

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[7] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, Statistics of Railways in the United States 1908 41, 99 (1909). On several occasions at the end of the previous century, President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliances Act, c. 196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

FELA was straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad.

FELA embraced the concept of common law negligence, while expressly modifying some of the harsher aspects of nineteenth century common law. At the time of FELA's enactment the common law had erected a number of often insurmountable barriers to recovery by workers sustaining job-related injuries.[8] To ameliorate the harsh results which often were a consequence of prevailing legal doctrines, Congress made several specific changes to existing common law. For example, in an effort to promote recovery, the defenses of assumption of the risk and the fellow servant doctrine were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).[9] Additionally, in what, for the time,

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[8] For example, recovery also was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 28 Minn. 128 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

[9] Initially, FELA eliminated the assumption of the risk defense only in cases where the railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943).

was a significant innovation in tort law, FELA incorporated the doctrine of comparative fault. The prevailing rule in the United States in the nineteenth century was that contributory negligence by the plaintiff completely barred recovery, even if the defendant also was at fault. *E.g., Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884)("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.") Under FELA, rather than completely barring recovery, if the employee's negligence contributed to the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. §53.[10]

Despite Congress' decision to modify or eliminate some of the prevailing common law defenses, there is no evidence that Congress believed it was modifying the core concept of negligence that underlies the statute. Contemporaneously with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, at 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion whatsoever that the standards of causation or negligence were being modified. The House of Representatives offered an identical list when it described the how FELA "change[d] the common-law liability of employers."

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[10] Contributory negligence is not considered if the injury is caused by violation of a safety statute. 45 U.S.C. §53

H.R Rep. No. 1386, at 1 (1908), noting, in addition, that the FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." *Id.*

Similarly, this Court's understanding of the changes made to common law by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N. H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). Again, nowhere was it suggested that replacement of the proximate cause standard by a more lenient causation requirement was among FELA's modifications to the common law. Last year, in *Sorrell*, this Court again "catalogued" the ways in which FELA departed from the common law, stating only that FELA "abolished the fellow servant rule; rejected contributory negligence in favor of comparative negligence; prohibited employers from contracting around the Act, and abolished the assumption of the risk defense." 127 S.Ct. at 807.

Indisputably, when Congress enacted FELA it attempted to make recovery more likely than would

have been the case under the prevailing law. However, it is equally indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concepts of causation and negligence. That point was consistently recognized by this Court in the decades immediately following FELA's enactment. *See e.g., Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916)(The rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery.") Consistent with that approach, in the years following FELA's enactment, this Court issued a number of decisions confirming that proximate cause is the applicable causation standard under FELA. *See e.g., Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

In fact, during the first half of the twentieth century, this Court continued to articulate the traditional common law concepts of negligence and causation as the proper standards under FELA. *E.g., Tennant v. Peoria & Pakin Union Ry. Co.*, 321 U.S. 29, 32 (1944)(The employee has to prove that the railroad's negligence "was the proximate cause in whole or in part of the fatal accident."); *Bailey v. Vermont Cent. R.R.*, 319 U.S. 350, 353 (1943)(FELA "has been largely fashioned from the common law [citation omitted] except as Congress has written into the Act different standards." Negligence is the duty "to use reasonable care."); *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949)(Petitioner was entitled to recover if the "defective equipment was the sole or a contributory proximate cause of the decedent employee's death."); *Urie v. Thompson*, 337 U.S. 163, 182 (1949)(FELA "is founded on common-law con-

cepts of negligence and injury."); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949)(Negligence is "what a reasonable and prudent person would have done under the same circumstances."). Other than its reliance on equally erroneous prior Second Circuit precedent, there simply is no basis for the lower court's conclusion that "FELA defendants may be held liable for injuries that would be considered too remote under common law." [Petition at 17a.]

II. IT IS NOT THE ROLE OF THE COURTS TO INCORPORATE NO-FAULT COMPENSATION PRINCIPLES INTO FELA WHERE CONGRESS DID NOT INTEND TO DO SO; MOREOVER, IT IS BAD PUBLIC POLICY

Perhaps if rail employee compensation legislation had been considered a decade later Congress would have turned to a no-fault compensation law for railroad workers. Shortly after FELA was enacted, individual states began to adopt no-fault workers' compensation laws as the means of compensating workplace injuries. Most states enacted workers' compensation laws of general application between 1910 and 1920; by 1930 all but four states had enacted a workers' compensation law.[11] In 1916, Congress enacted a no-fault compensation statute for employees of the federal government, Federal Employees Compensation Act, 5 U.S.C. §8101 *et seq.*, and in 1927 Congress enacted a no-fault compensation statute to cover workplace injuries for harbor workers. Longshore

[11] In 1948, Mississippi became the last state to adopt a workers' compensation law. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998).

and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. However, for railroad workers, Congress enacted, and has maintained in place, a tort system.

Nonetheless, through the decision below, and numerous similar rulings, many lower courts are incorporating no-fault concepts into FELA[12] This is contrary to Congress' intent. Moreover, given FELA's incorporation of tort damages principles, it is misguided and unsound public policy.

Tort law and compensation law approach questions of liability from fundamentally different perspectives. Under workers' compensation, "unlike tort, the right to benefits and amount of benefits, are largely based on a social theory of providing support and preventing destitution, rather than settling accounts between the individuals according to their personal deserts or blame." A. LARSON & K. LARSON, LARSON'S WORKERS' COMPENSATION LAW §1.02 (2004 ed.) The right to compensation is conditioned on whether

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[12] Interestingly, in a number of cases decided in the middle of the last century, around the time when workers' compensation became established as the prevailing means of addressing workplace injuries, some of the Justices of this Court questioned whether a tort system was appropriate for addressing workplace injuries in the railroad industry. *See Bailey supra*, 319 U.S. at 354; *Wilkerson supra*, 336 U.S. at 65 (Frankfurter, J. concurring). At the same time, it was recognized that regardless of the answer to that question, the Court had no authority to incorporate no-fault concepts into FELA. "I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence." *Bailey*, 319 U.S. at 358 (opinion of Justice Roberts). "It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be." *Wilkerson* 336 U.S. at 66 (Frankfurter, J., concurring).

there was "a work-connected injury. Negligence, and for the most part, fault, are not in issue and cannot affect the result." *Id.* at §1.03[1]. Moreover, under workers' compensation, "unlike in tort, the only injuries compensated are those which actually or presumptively produce disability and thereby presumably affect earning power." *Id.* at §1.03[4].

Workers' compensation embodies a significant tradeoff: the right of the employee to seek a full recovery is removed in exchange for the certainty of more limited benefits regardless of fault. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 9 (1998). This is one of the "fundamental points of cleavage between compensation and tort." LARSON at §1.03[4]. Under workers' compensation, "[t]he amount of compensation for disability depends on the worker's previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week." LARSON at §1.03[5]. "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.*

The primary objective of workers' compensation is to sustain the injured employee through his or her period of disability and to promote rehabilitation and return to gainful employment. One reason workers' compensation systems establish limits on wage loss benefits is the widely accepted view that if compensation matches, exceeds, or even approaches, the em-

ployee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly.[13]

Though FELA serves in place of a workers' compensation act for the railroad industry, liability is not bounded by the caps and limitations that typically characterize workers' compensation laws. In FELA cases, juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952)("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason."); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975) ("[T]he extent of damages under FELA is peculiarly a fact question for the jury."). Thus, seven figure FELA awards are not uncommon, *e.g.*, *DeBiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995)($4.2 million award affirmed); *Frazier v. Norfolk & Western Ry. Co.*, 996 F.2d 922 (7th Cir. 1993)($2.3 million award not excessive), and a verdict will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993)

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[13] Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995); Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No.4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits. . . . higher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

($1.75 million verdict, including over $1 million in intangible damages, not excessive).

The right to uncapped damages in tort is offset by the fact that damages can be recovered only if the defendant's fault is proved. "Theoretically, the most conspicuous difference between FELA remedies and compensation is that, under FELA, those workers who happen to be able to prove negligence obtain large verdicts at the expense, so to speak, of all other injured workers, who receive nothing, while under compensation laws everyone gets limited but assured cash payments and medical care." LARSON at §147.07[6]. However, as a result of judicial construction of FELA, "when the worker does assert his or her FELA rights, the actual basis for recovery is much closer to a nonfault type of liability and further from an old-fashioned negligence liability than the printed page of the statute book may lead one to believe." *Id.* at §147.07[7]. "Unless a significant percentage of comparative negligence can be proven, the FELA operates much like a no-fault law but with full tort damages available." LENCSIS at 24.

Incorporating the workers' compensation concept of liability without fault into FELA undermines the goals of both systems. The ability to collect full tort damages without the need properly to demonstrate fault neither acts as a deterrent to wrongful conduct nor effectively promotes prompt return to the job. Given the realities of litigation, FELA plaintiffs often will attempt to maximize their recovery by declining to return to the job or undergo rehabilitation, asserting in the FELA suit that they are permanently disabled from working. After disposition of the litigation and collection of an award, the same worker may

seek to return to employment with the railroad, claiming he has recovered.[14]

* * *

In recent years, this Court has properly resisted entreaties to allow FELA's "remedial and humanitarian" purposes[15] to trump the language of the statute and Congress's intent. *Sorrell*, 127 S.Ct. at 808. ("It does not follow . . . that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees.")[16] However, taking a different

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[14] Typically, these efforts are foreclosed by judicial estoppel. *See Lewandowski v. Nat'l R.R. Pass. Corp.*, 882 F.2d 815 (3rd Cir. 1989); *Morawa v. Consolidated Rail Corp.*, 819 F.2d 289 (6th Cir. 1987); *Jones v. Cent. of Georgia Ry. Co.*, 331 F.2d 649 (5th Cir. 1964); *Scarano v.Cent. R.R. of New Jersey*, 203 F.2d 510 (3rd Cir. 1953).

[15] *See e.g., Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000)("FELA is 'a remedial and humanitarian statute.'")

[16] In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court rejected the Third Circuit's decision to disregard common law limitations on recovery for negligent infliction of emotional distress in order to promote FELA's preference for a liberal recovery. Instead, the Court held that FELA required application of the common law zone of danger test, a test which ultimately resulted in both plaintiffs' claims being rejected. In *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997), consistent with the policy considerations underlying the common law limitations on emotional distress claims, this Court denied recovery for negligent infliction of emotional distress to an asymptomatic plaintiff who was exposed to asbestos, rejecting plaintiff's argument that the "'humanitarian' nature of the FELA warrants" recovery. 521 U.S. at 438. Earlier, in *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988), this Court rejected the argument that to foster FELA's humanitarian purposes, prejudgment interest be permitted even though it was not available at common law when FELA was enacted.

path, the Second Circuit and many other lower courts have transformed FELA into a compensation hybrid—unlike any system in the nation—with a liability standard approaching "no-fault," but with full tort damages available to plaintiffs. This would be acceptable if, in fact, it was the course chosen by Congress. But it is not. This Court should grant certiorari to provide lower courts with much need guidance on the proper standards of negligence and causation—fundamental concepts that can have a profound effect on the outcome of virtually every FELA case.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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October 2, 2008

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:05CV-456-H

ROBERT A. KRIEG

Plaintiff,

v.

CSX TRANSPORTATION, INC.

Defendant.

MEMORANDUM OPINION AND ORDER

This is a claim brought under the Federal Employers Liability Act ("FELA"), which makes railroads liable to any employee for injuries where its negligence played any part, even the slightest, in producing that injury. Here, Plaintiff alleges a neck injury caused by a "rough coupling." Defendant has moved for summary judgment on the grounds that events in question were regular occurrences and that Plaintiff has no proof of negligence.

I.

On April 16, 2001, Plaintiff was hired by CSXT as a switchman. Plaintiff completed his CSXT training August 1, 2001, and began work. He was furloughed August 25, 2001, for seven months, and returned to CSXT approximately early March 2002, again as a switchman. He worked as a switchman on the

extraboard for approximately four months, and was moved into Remote Control Operation ("RCO") training.

When working an RCO job, the employee wears a locomotive control unit, identified as a LCU or OCU, operating control unit. An employee working an RCO job out of the Osborn Yard in Louisville is teamed with another RCO operator, who also wears an OCU, and potentially is also capable of operating the train with his OCU, The OCU is a green box that the employee wears on a vest, weighing about 2 1/2 pounds. It consists of a computer that controls the engine's movements (back and forth), speed, brakes, horn, bell and head lights.

On August 14, 2002, Plaintiff claims he was injured as a result of a "rough coupling" while working onboard engine 6022. His co-worker, David Lantz was on the ground controlling the movement. At the time of the accident Plaintiff as Operator B positioned in the engineer seat on the right side of the unit behind the control stand. Lantz was on the ground, controlling the movement of 6022 with his OCU. Lantz testified that he made his safely stop; began to rev the unit by moving the throttle on the control box; made sure the draw bars were lined up and placed the controls at the "couple" setting. The locomotive began to build up, he heard the engine's brakes release and then he remembered locomotive 6022 lunged forward in the coupling move.

Lantz testified that as Operator A, he had no control over the lunge movement and no advance warning of it. The locomotive was moving on its own, and then spurted forward resulting in a rough coupling. Plaintiff testified that the locomotive 6022 lunged forward into the box car and he felt

immediate pain in his neck. He reported the injury a short time later to Trainmaster Fred Sierota and Terminal Superintendent John Bradley.

Plaintiff testified that he personally had experienced operating problems with CSXT 6022 prior to August 14, 2002, including prior instances of the locomotive "surging," and other instances whereby 6022 would lose communication with the OCU, thereby throwing the unit into emergency. Lantz testified that this incident was similar to other rough coupling incidents that occurred fairly routinely.

On August 11, 2005 Plaintiff filed a two-count complaint against CSXT. Court I is based upon the Federal Employers Liability Act, and Count II is based upon a violation of the Locomotive Inspection Act.

II.

Under FELA, [e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. FELA provides broad remedial measures for railroad employees. *Lisek v. Norfolk and Western Railway Company,* 30 F.3d 823, 831 (7th Cir. 1994). In a FELA action, the railroad will be held liable if the employer's "negligence played any part, even the slightest, in producing the injury." *Id* at 832 (internal quotations and citations omitted). Plaintiff's burden is significantly lighter than in an ordinary negligence case. *Id*

FELA is a general negligence statute and as such, it neither prohibits nor requires specific conduct by a railroad. *Waymire v. Norfolk and Western Railway*

Company, 218 F.3d 773, 775 (7th Cir. 2000). LIA imposes absolute duties to provide safe equipment. *DeBiasio v. Illinois Central Railroad,* 52 F.3d 678, 683 (7th Cir. 1995); *Richardson v. Consolidated Rail Corp.,* 17 F.3d 213, 216 (7th Cir. 1994) (BIA, also known as LIA). LIA does not create private rights of action, but employees alleging injury resulting from a violation of the LIA may sue under FELA. *Crane v. Cedar Rapids & Iowa Railway Company,* 395 U.S. 164, 166 (1969). Thus, an employee may recover under FELA for injuries resulting in whole or in part from a railroad carrier's negligence or from its violation of the LIA. *O'Donnell v. Elgin, Joliet and Eastern Railway Co.,* 338 U.S. 384, 391 (1949); *Crane,* 395 U.S. at 166.

Plaintiff's particular claim is based upon the theory that locomotive 6022 was not operating in a proper or safe condition, nor functioning in a "normal, natural and usual manner." These circumstances violate the LIA. *See* 49 U.S.C. § 20701; *Meyers v. Reading Company,* 331 U.S. 477, 483 (1947). Plaintiff argues that the improper or unsafe condition was that the 6022 had a tendency to "lunge" or "surge" at the moment of coupling. This appears to be a weak case, even by FELA's standards. Some of the testimony supports that similar "rough couplings" are not an unusual occurrence. Moreover, it is unclear whether such a low speed lunge or surge is actually unsafe. The nature of the incident itself appears mild. No other evidence suggests other injuries from similar incidents. The testimony of the two key witnesses seems to differ on some key interpretation of events. These factors cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA case.

Nevertheless, some of the evidence does suggest that locomotive 6022 was prone to such surges to a greater extent than others. Moreover, Plaintiff claims to have warned Defendant about the tendency to lunge or surge. Should the jury believe this testimony, it would not be unreasonable to conclude that the locomotive was unsafe. A jury could also believe that Defendant was on notice, of the unsafe condition and was negligent in failing to attend to it. These inferences would be sufficient for the claim to survive summary judgment under FELA.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment is DENIED.

The Court will set a conference in the near future to assign a trial date.

[SEAL]

/s/ John G. Heyburn II
John G. Heyburn II
Chief Judge, U.S. District Court

September 25, 2006

cc: Counsel of Record

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-01-914 GGH

JOSEPH W. KOLLER,
Plaintiff,

vs.

BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY,
Defendant.

ORDER

Hearing on defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56, was held on April 25, 2002.[1]

BACKGROUND

Plaintiff, a railroad brakeman, was injured on July 23, 1998. While working in the Gateley area near Pinole/Richmond, he was attacked by two teenagers with a two by four. His neck and shoulder were injured. He brings this action against his defendant employer, the "railroad," pursuant to 45 U.S.C. § 56, *et. seq.*, the Federal Employees Liability Act ("FELA"), for its allegedly negligent failure to prevent a third party attack.

The railroad has moved for summary judgment on three grounds. The railroad asserts plaintiff has

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[1] The case is before the undersigned pursuant to 28 U.S.C § 636(c) (consent to proceed before a magistrate judge).

failed to adduce disputed facts sufficient to establish: a) that plaintiff's injury was reasonably foreseeable; b) that the railroad breached its duty to provide adequate security; or c) that the railroad's conduct was the cause of plaintiff's injuries. Because a FELA plaintiff need produce only slight or minimal facts to support a jury finding of negligence, and plaintiff has met that standard, defendant's motion is DENIED. *See Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 83 S.Ct. 659 (1963) (railroad chargeable with notice of a dangerous insect bred in a stagnant pool of water on the railroad's right-of-way).

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment avoids unnecessary trials in cases with no disputed material facts. *See Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986). Two steps are necessary. First, according to the substantive law, the court must determine what facts are material. Second, in light of the appropriate standard of proof, the court must determine whether material factual disputes require resolution at trial. *See id.* at 248, 106 S. Ct. 2510.

When the opposing party has the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *See e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885, 110 S. Ct. 3177, 3187 (1990), When the opposing party has the burden of proof, the moving

party need only point to matters which demonstrate the absence of a genuine material factual issue. *See Celotex v. Cattret*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

If the moving party meets its burden, the burden shifts to the opposing party to establish genuine material factual issues. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S, 574, 586, 106 S. Ct. 1348, 1356 (1986).[2] The opposing party must demonstrate that disputed facts are material, *i.e.*, facts that might affect the outcome of the suit under the governing law, *see Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that disputes are genuine, *i.e.*, the parties' differing versions of the truth require resolution at trial, *see T.W. Elec.*, 809 F.2d at 631. The opposing party may not rest upon the pleadings' mere allegations or denials, but must present *evidence* of specific disputed facts. *See Anderson*, 477 U.S. at 248, 106 S. Ct. 2510.[3] Conclusory statements cannot defeat a properly supported summary judgment motion. *See Scott v. Rosenberg*, 702 F.2d 1263, 1271-72 (9th Cir. 1983).

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[2] The nonmoving party with the burden of proof "must establish each element of his claim with significant probative evidence tending to support the complaint." *Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994) (internal quotations omitted). A complete failure of proof on an essential element of the nonmoving party's case renders all other facts immaterial, and entitles the moving party to summary judgment. *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

[3] A verified complaint may be used as an affidavit in opposition to the motion. *Schroeder v McDonald*, 55 F. 3d 454, 460 (9th Cir. 1995); *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curiam).

The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. *See Anderson* at 249, 255, 106 S. Ct. at 2510-11, 1513. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. *American Int'l Group, Inc. v. American Int'l Bank*, 926 F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552).

If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On the other hand, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587, 106 S. Ct. 1356 (citation omitted). In that case, the court should grant summary judgment.

"[A]lthough railroad companies do not insure against accidents and the plaintiff in FELA cases still bears the burden of proving negligence, courts have held that only 'slight' or 'minimal' evidence is needed to raise a jury question of negligence under FELA." *Mendoza v. Southern Pac. Transp. Co.*, 733 F.2d 631, 632 (9th Cir.1984) (internal citations omitted). "A jury's right to pass upon the questions of fault and causation in FELA actions must be viewed liberally; the jury's power to engage in inferences is significantly broader than in common law negligence actions." *Pierce v. Southern Pacific Transp, Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987) (citing *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147, 149 (8th Cir.1982)).

APPLICATION

A. Forseeability

Urging that judgment should be granted to defendant because plaintiffs claims were not "foreseeable," does not adequately categorize those elements of tort law which are generally reserved to the court or to the jury. "Foreseeability" is a concept that spreads itself throughout those elements. The law sometimes draws a line for actionable and non-actionable injuries on the basis that a lack of foreseeability precludes a duty being found. *See Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865 (no duty to anticipate that mother not present at the accident site of her child would suffer emotional distress when she arrived at the scene). Foreseeability there simply means that policy considerations permit or preclude stretching liability to cover a general situation. As tort law has evolved, and duty questions have been hashed out for the most part, the question of foreseeability is more often a fact bound part of the causation analysis—was it "foreseeable that certain actions would result in a particular injury." *See Isaacs v. Huntington Memorail Hospital*, 38 Cal. 3d 112, 131 (n.8), 211 Cal. Rptr. 356 (1985); but *see Saelzler v. Advanced Group*, 25 Cal. 4th 763, 777-78, 107 Cal. Rptr. 2d 617, 627-28 (2001) (distancing itself from *Isaccs* on the connection between foreseeability and causation). Finally, when foreseeability of a risk is at issue, and the law presumes a duty in the general situation, the real issue generally is not whether a duty exists, but whether an admitted duty was breached, *i.e.*, whether defendant acted reasonably. *Marois v. Royal Investigation and Patrol*, 162 Cal. App. 3d 196, 198 (n.2), 208 Cal. Rptr. 384,

387 (1984)[4] Of course, when the risk is perceived, yet injury occurred, the question for the jury centers about the precise actions taken by defendant designed to protect against such injury. Defendant's first thrust herein—that it had no notice that plaintiff's place of injury required security designed to prevent serious injuries inflicted by third parties is directed at the breach of a duty.

"Under the theory of direct negligence, an employer is liable if it fails to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct." *Mullahon v. Union Pac. RR.*, 64 F.3d 1358, 1362 (9th Cir, 1995) (quoting *Taylor v. Burlington Northern R.R.*, 787 F.2d 1309, 1314-15 (9th Cir.1986)). The duty under FELA to provide a safe workplace is non-delegable. *Burlington Northern R. Co. v. Farmers Union Oil Co. of Rolla*, 207 F.3d 526, 532 (8th Cir. 2000). Thus, the existence of defendant's duty is without question.

Turning to whether defendant had sufficient notice to warrant placement of security (a foreseeability of risk breach issue), plaintiff has produced evidence from which a conclusion could be drawn that the area in which plaintiff was injured was unsafe. Employee Robert Varao testified that in 1998 there were trespassers, homeless people, kids and people drinking under the Gateley overpass– "it's just a bad area, a dirty area." (Varao Depn at 8-9). Varao believed the underpass was unsafe, and had been frightened in the area. Engineer Matthew Fike had had rocks thrown at him as well as liquor bottles. He had reported incidents of rock throwing, beer bottle throw-

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[4] However, at times, foreseeability of the risk is determined under a "scope of the duty" rubric. *Ann M. v. Pacific Plaza Shopping Ctr.*, 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137 (1993)

ing and vandalism. He personally had spoken with a railroad security officer about problems at the overpass, and had reported trespassers, homeless encampments, and rock throwing there. A retired railroad police captain, Kevin Lynch, and Frank Saunders, proffered by plaintiff as a police expert, both testified that the attack on plaintiff was foreseeable, given the conditions at the overpass. While the railroad disputes these facts, plaintiff has adduced sufficient evidence to survive summary judgment on the question of "foreseeability."

B. Adequate Security

The railroad argues summary judgment should be granted because the railroad took adequate security steps, including patrolling, prosecuting trespassers, meeting with local law enforcement officials, and instructing crews to report suspicious activity. Here, the railroad assumes that it had sufficient notice of the potential security problems at the injury site, but asks the court to find as matter of law that it acted reasonably in providing adequate security. Whether the railroad took reasonable care to protect its employees in light of the known hazards at Gateley, however, is a question more properly decided by a jury. In contrast to the railroad's arguments, plaintiff has proffered witnesses who opined that the railroad security was inadequate in several respects, including reducing its security force, assigning one officer to patrol 70 miles of track in an unmarked vehicle, failing to fence off an area known to be a gathering spot for criminals, and to remove graffiti, mattresses, and garbage.

C. Causation

In a FELA case, the causation standard is relaxed. *See Smith v. National Railroad Passenger Corp.*, 856

F.2d 467 (2d Cir. 1988). "We have liberally construed [the] F.E.L.A. to further Congress' remedial goal." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542, 114 S Ct. 2396, 2404 (1994) (citing as an example the relaxed standard of causation applied in *Rogers v Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443 (1957)).

Defendant contends that plaintiff has not established a nexus between the claimed lack of security vis-a-vis plaintiff's injury, and that the area in any event was also patrolled by the local police department, the sheriff's department, and the California Highway Patrol. Citing *Thomas v. Consolidated Rail Corporation*, 971 F. Supp. 620, 621 (D. Mass. 1997), defendant concludes that plaintiff cannot show that a lack of railroad security caused the third party trespass at issue here—yet another aspect of "foreseeability." In other words, the railroad insists that even assuming a duty to provide security, and even assuming a breach of that duty in the abstract, lack of security could not have been a cause for plaintiff's injury because no amount of additional (reasonable) security would have prevented the injury, or, in the alternative, that security existed (in reasonable measure) from other sources.

Plaintiff contends security of any type was not adequate and has proffered evidence that security had seldom, if ever, been observed in the area. The record is conflicting concerning the existence of non-railroad security at this point. The nature and extent of the security force patrolling the area, and its effectiveness, are disputed factual questions for resolution by a jury. Plaintiff need not show that the lack of security was the sole cause of the trespass which led to the criminal conduct. Plaintiff need only show that

defendant's negligence, even if slight, was one of the causes of plaintiff's injuries.

However, plaintiff should not find from this order that he is completely out of the causation woods. In cases with similar allegations, albeit general tort cases utilizing "a substantia factor" causation standard, courts have found lack of established causation because the plaintiff did not provide "by non-speculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." *Saelzler*, 25 Cal. 4th at 774, 107 Cal. Rptr. 2d at 625 relying on *Thai v. Stang*, 214 Cal. App. 3d 1264, 1276, 263 Cal. Rptr. 202 (1989) (characterizing as "pure speculation" expert testimony that absence of added security contributed to criminal assault). Indeed, in *Nola M. v. University of California*, 16 Cal. App. 4th 421, 20 Cal. Rptr. 2d 97 (1993), a plaintiff's judgment was reversed because she did not show a connection between an asserted need for increase in security and her specific injury (a rape). The court merely finds at this juncture that plaintiff has produced sufficient evidence, drawing all inferences in plaintiff's favor, and given the weakened causation standard in FELA cases, to go forward on his theory of causation. The court will not hesitate to award judgment pursuant to Fed. R. Civ. P. 50 if the *trial* evidence does not establish *some* non-speculative link, however small, between the security measures allegedly not taken and plaintiff's injury, or if the *trial* evidence demonstrates that the absent railroad security measures argued by plaintiff were in fact being provided in substantial measure by another entity.

CONCLUSION

Disputed issues of material fact preclude entry of summary judgment in this FELA case, Accordingly, IT IS ORDERED that defendant's motion for summary judgment is DENIED.

DATED MAY 8, 2002 /s/Gregory G. Hollows
Gregory G. Hollows
U.S. Magistrate Judge